APPENDIX

APPENDIX A

Statutes

Statute of Limitations, 62 Stat. 976, 28 U. S. C., Sec. 2501:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues."

Act of April 3, 1939, 53 Stat. 557, 10 U. S. C., Sec. 456:

"Provided further, That all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government, for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army."

Act of September 26, 1941, 55 Stat. 734, 38 U. S. C., Sec. 12:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Reserve officers, Army of the United States, who were called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days on or subsequent to February 28, 1925, other than for service with the Civilian Conservation Corps, and who are now disabled from disease or injury contracted or received in line of duty while so employed, shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same retirement pay and hospital benefits as are

now or may hereafter be provided by law or regulation for officers of corresponding grades and length of service of the Regular Army.

Sec. 2. That the duties, powers, and functions incident to the administration and payment of the benefits herein provided are hereby vested in the Veterans' Administration: Provided, That in the administration of the retirement pay provisions of the said statute the determination of all questions of eligibility for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War Department, in the manner, and in accordance with the standards, provided by law or regulations for Regular Army personnel: And provided further, That no bounty, back pay, pension, or allowance shall be held to have accrued prior to the passage of this Act."

Act of June 22, 1944, 58 Stat. 287, 38 U. S. C., Sec. 693i:

"Sec. 302. (a) The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released to inactive service, without pay, for physical disability pursuant to the decision of a retiring board, the findings and decision of such retiring board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the retiring board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of the retiring board shall be transmitted to the Secretary of War, the Secretary of the Navy, or the Secretary of the Treasury, as the case

may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after the effective date of this Act, whichever is the later."

Act of October 25, 1951, 65 Stat. 655, 5 U. S. C., Sec. 191a:

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and correction so made shall be final and conclusive on all officers of the Government except when procured by means of fraud: Provided, That procedures set up by the Secretaries of the Army, Navy, and Air Force in accordance with this subsection shall be approved by the Secretary of Defense; Provided further, That no corrective action shall be taken under this subsection unless the request therefor be filed by claimant, his heirs at law, or legal representatives within three years after his or their discovery of the alleged error or injustice, or within ten years after the date of enactment of this section, whichever be the later: Provided further, That the failure to file the request by claimant, his heirs at law, or legal representative, within three years after his or their discovery of the alleged error or injustice may be excused by such board of civilian officers or employees of the respective Departments upon finding by it that it is in the interest of justice to excuse such failure to file within the prescribed time in which event action shall be taken in the same manners as if the request had been filed within the three years as prescribed herein."

R. S. 1268, 10 U. S. C., Sec. 861:

"Officers to be paid monthly. The sums allowed to officer for pay, rental allowances and subsistence shall be paid in monthly payments."

APPENDIX B

Mistakes and Injustices Resulting in Denial of Disability Retirement Pay to Non-Regular Officers of the Armed Services as Disclosed in 1948 Congressional Hearings

In the Annual Convention of the Reserve Officers Association of 1946, the following resolution was adopted (Hearings before the Legal Sub-committee on Armed Services, House of Representatives, 80th Congress, 2nd Session, pursuant to H. Res. 141 and H. Res. 447, February-March, 1948, page 161):

"Whereas, many officers of the Reserve Corps, National Guard, and Army of the United States have suffered disabilities incident to their active duty service; and

Whereas, the Congress of the United States, by the act of April 3, 1939 (53 Stat. 557), as amended, provided for retirement pay, and other benefits, in such cases, and

Whereas, the Army Regulations and Technical Manual 12-245 published to implement that act and to provide equality of action between the cases of officers of the Regular Army and officers of the other components, are clear and fair, and

Whereas the provisions of the act and the regulations are being so flagrantly violated by the retiring boards and the office of the Surgeon General of the Army as to nullify and defeat the intent of the act of April 3, 1939, as amended; and

Whereas such action has denied to many officers, not members of the Regular Army, benefits which the Congress provided for them: Now, therefore, be it

RESOLVED, That the Reserve Officers Association of the United States condemns the aforesaid actions of the War Department and demands the immediate discontinuance of discriminatory and illegal denial of the rights of officers of the civilian components of the Army; and be it further

RESOLVED, That the Congress of the United States be requested to investigate all cases which have been decided by retiring boards, fix the responsibility for improper administration, and to provide remedial action in all such cases; . . .".

As a result of the request authorized in the foregoing resolution and other requests, the House of Representatives

appointed a Subcommittee of the Committee on Armed Services to conduct an investigation. The testimony before the Subcommittee showed, among other things, the following injustices resulting in the denial of retirement pay to non-Regular officers:

1. When Retiring Boards recommended retirement of these officers, the Surgeon General frequently returned the proceedings for reconsideration, sometimes four or five or more times, until he obtained denial of retirement (Hearings, pages 85, 143, 72, 133, 304).

In one case, he reversed four Disposition Boards and seventeen medical officers in the field who had actually examined and interrogated the officer (Hearings, page 133). Of the non-Regulars actually retired, 30 percent had been sent back one or more times to the Retiring Boards (Hearings, page 142). The Committee was unable to obtain a figure of the percentage of cases of officers not retired who were sent back to the Retiring Boards (Hearings, page 72). One service organization representative, who had close contact with these matters, testified that such a figure would be "astonishing" (Hearings, page 142). An investigation for the Army Service Forces disclosed that in 1946, 30 percent to 50 percent of the proceedings were returned by the Surgeon General (Hearings, page 85).

2. A double standard was used for Regulars and non-Regulars. Regulars were retired if they were incapacitated for full military service; non-Regulars only if incapacitated for civilian service (Hearings, pages 120-121). This was a plain infraction of the law, "condemned" by the Committee in its Report (Report, page 6034). Disposition Boards were requested not to recommend sending officers to Retiring Boards because the latter were bound by the statutes, whereas the Disposition Boards were not (Hearings, page 120). In the memorandum setting forth the double standard and the request to the Disposition Boards, it was stated:

"We hope (this discussion) will have demonstrated to you the importance of cutting off these cases at Disposition Board level rather than sending them on to the Retiring Boards for decision." (Hearings, 121).

In this way the non-Regular officers were deprived of the fair hearing assured them by the statutes and regulations (R. S. 1253, 10 U. S. C. Sec. 966; W. D. Technical Manual 12-245, 1 Oct. 1945, Par. 20d, p. 49).

3. Star chamber tactics were engaged in at the hospitals. Access to hospital records were denied. Civilian consultation was resentfully granted or summarily refused. Resentment was manifested against private lawyers. Medical witnesses were controlled. They would say one thing to the patient one day and completely reverse themselves before the Board the next day (Hearings, pages 168-69, 176).

4. Whereas 16⅔ percent of the Regular officers were retired, only 3.3 percent of the non-Regulars were (Hearings, page 162). Only 30 percent of the non-Regular officers who appeared before Retiring Boards were retired, as against approximately 100 percent of the Regulars (Hearings, pages 176, 403).

5. Many officers, in a limited duty status, were illegally separated without appearance before a Retiring Board (Hearings, page 117). Many officers were found physically fit with a "waiver" of their disabilities. This device deprived the officer of the exercise of his Review Board remedy which, by administrative construction of the 1944 statute, could be availed of only if the officer were released for physical disability (Hearings, page 263). Doubts were resolved against the officers (Hearings, pages 289, 300).

6. Representative Teague, of Texas, who served on a Retiring Board approximately a year, was one of the most important witnesses before the Committee. He testified fully upon the injustices related above. He stated that many men, who were not retired, should have been; that when his Board made favorable findings, they were frequently re-

turned by the Surgeon General, but never when the findings were unfavorable. Doubts were resolved against the officer by the Surgeon General who controlled the proceedings and had the last word (Hearings, pages 296-304).

The Report of the Subcommittee makes definite findings of serious wrongs committed against the non-Regulars. The committee points out the great disparity between the percentages of Regulars and non-Regulars retired (Report, 6021).

"The administrative procedures followed by the Surgeon General's officers after a case has been processed by an Army Retiring Board prompts us to conclude that discrimination was practiced against the non-Regular officer." (R. 6032)

The committee also stated (Report, page 6032):

"Granting the propriety of an initial disapproval of the Surgeon General in order to effect uniform standards, we cannot agree that the continuing disapproval of the Surgeon General of the same case for as many as four or five times is appropriate. Our only witness with retiring board experience stated that the repeated disapproval of an Army retiring board's recommendation for retirement was ultimately construed to be an order to deny retirement. The end result was that one or two medical officers in the Surgeon General's Office were permitted to overrule and nullify the findings of at least seven other medical officers who had either examined the subject officer or had personal knowledge of his case. Numerous cases have been presented to the committee which involve repeated disapprovals of the medical findings of an Army retiring board by the Surgeon General's Office."

Adverting to the imposition of a double standard in plain violation of the Act of 3 April 1939, the enactment of which the Army "strongly opposed" in the first instance (Report, 6033), the committee said:

"Frankly, we do not know whether the action was the result of inadvertence or prejudice, but it was so improper that we take this opportunity to condemn it." (6034)

The Subcommittee also stated in its report (page 6032):

"In processing such large numbers of cases, it was inevitable that some mistakes did occur, and both the Army and the Navy admit that many mistakes did occur. The best evidence that mistakes were committed lies in the fact that approximately 90 non-Regular Navy officers and 684 non-Regular Army officers have been physically retired by the review boards under section 302 of the Servicemen's Readjustment Act of 1944. None of these officers would now be drawing disability retirement benefits if their sole means of relief had been confined to Army and Navy retiring procedures. We cannot feel that all of these cases were purely mistakes in judgment."

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 104-55

(Decided May 1, 1956.)

WILLIAM R. BARKER v. THE UNITED STATES

Mr. Paul R. Harmel for the plaintiff.

Mr. LeRoy Southmayd, Jr., with whom was *Mr. Acting Assistant Attorney General Joseph D. Guilfoyle,* for the defendant.

On Defendant's and Plaintiff's Motions for Summary Judgment

LARAMORE, *Judge,* delivered the opinion of the court:

Plaintiff, a former officer in the Army of the United States, seeks to recover disability retirement pay from July 25, 1946, when he was relieved from active duty, not by reason of physical disability, to February 18, 1947, when he was recalled to active duty; and from May 14, 1947, when plaintiff was again relieved from active duty, not by reason of physical disability, to date of judgment.

The allegations of the petition, together with the exhibits attached thereto, show the following facts with reference to plaintiff's service record.

Plaintiff was appointed a second lieutenant, Infantry, Officer's Reserve Corps, May 31, 1942; promoted to first lieutenant, Army of the United States, July 17, 1943; promoted to captain, Army of the United States, March 27, 1946; appointed captain, Infantry, Officers' Reserve Corps, March 28, 1946; relieved from active duty on July 25, 1946, "not by reason of physical disability"; appointed first lieutenant, Army of the United States, February 7, 1947, vacating commission as captain, Army of the United States; recalled to active duty February 18, 1947; promoted to captain, Army of the United States, May 8, 1947; relieved

from active duty May 14, 1947, "not by reason of physical disability"; transferred to Honorary Reserve, April 6, 1951; appointed captain, Honorary, United States Army Reserve, November 12, 1952; commission as captain, Army of the United States, terminated April 1, 1953, by operation of law; and plaintiff is now captain, Retired Reserve. He is credited with the following periods of active service as a commissioned officer: June 11, 1942, to July 25, 1946; February 18, 1947, to May 14, 1947; and February 23, 1951, to February 23, 1951. The petition alleges that plaintiff was wounded in combat with the enemy on four separate occasions for which he was hospitalized.

The certificate of the Department of the Army establishes that on March 27, 1947, plaintiff appeared before an Army retiring board which convened at Murphy General Hospital, Waltham, Massachusetts. The finding of the board was: "1st Lt. William R. Barker is *not* permanently incapacitated for active service." Recommendation of the board was: "Full military duty, with a waiver for moderate left ulnar deformity, and mild limitation of supination and pronation, left." These findings were concurred in by The Surgeon General and approved By Order of the Secretary of War on April 24, 1947. On May 14, 1947, plaintiff was thereupon relieved from active duty "not by reason of physical disability," under Special Orders No. 40, dated May 7, 1947.

During the Korean emergency the plaintiff was ordered to one-day active duty for the purpose of undergoing a physical examination, under Special Orders No. 38, dated February 21, 1951. On February 23, 1951, the plaintiff was examined for extended active duty at the U. S. Army Dispensary, Boston Army Base. The medical examiner noted the scarring resulting from a shrapnel wound, the resultant bone graft, and the loss of motion attendant thereto. Based upon the loss of motion, the examiner concluded that the plaintiff was not physically qualified for extended

active duty. Thereafter, on April 6, 1951, plaintiff was transferred from the Inactive Reserve to the Honorary Reserve by reason of being "permanently physically disqualified," pursuant to Special Orders No. 69.

Plaintiff's request to reopen his retirement proceedings was denied by the Department of the Army under dates of June 18, 1951, and April 4, 1952. Plaintiff was advised that authority did not exist for considering his case under the Career Compensation Act of 1949, 63 Stat. 802, and since plaintiff's release from active service was not the result of a retiring or disposition board action, his case was not eligible for review under section 302 of the Servicemen's Readjustment Act of 1944, 58 Stat. 284, 287, as amended, 38 U. S. C. § 693i.

On February 26, 1952, plaintiff filed an application with the Army Board for Correction of Military Records, pursuant to section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended by the Act of October 25, 1951, 65 Stat. 655. Plaintiff's application requested that the action of the retiring board of March 27, 1947, be corrected to show that he was, on the date of initial relief from active duty, incapacitated for active service and entitled to be retired.

On December 5, 1952, the plaintiff was informed by the Adjutant General as follows:

> A thorough examination of your military, medical and Veterans Administration records, together with the information submitted by you, fails to reveal any evidence of error or injustice relative to your separation from active service not by reason of physical disability. In this connection, you did not have sufficient disability on 25 July 1946, to warrant your retirement for physical disability under the rules, laws, and regulations in effect at that time.
>
> The administrative procedures established by the Secretary of the Army for the guidance of the Army

Board for Correction of Military Records provide that an application for a hearing by the Board may be denied when a sufficient basis for review has not been established.

I regret to advise you that careful consideration by the Army Board for Correction of Military Records, of your Army records, together with such facts as have been presented by you, fails to establish sufficient basis for a hearing of your case by the Board. Therefore, in the absence of additional material evidence, no further action on your application is contemplated.

The official records on file in the Office of the Adjutant General further disclose that on September 20, 1953, the plaintiff requested the Secretary of the Army to reconsider his application for correction of his records; and that on October 14, 1953, the plaintiff was informed by the Executive Secretary of the Army Board for Correction of Military Records that his application had again been thoroughly reviewed but a basis for relief had not been established.

Plaintiff continued to protest his separation "not by reason of physical disability." The official records on file in the Office of the Adjutant General disclose that on April 30, 1954, plaintiff was authorized to report to Walter Reed Army Medical Center, "for he purpose of undergoing a complete medical examination, appearance before a Medical Board and if warranted, appearance before a Physical Evaluation Board". Subsequently, for the convenience of the plaintiff, this authority was amended to permit plaintiff to report to the U. S. Army Hospital, Fort Devens, Massachusetts.

On May 20, 1954, plaintiff underwent a thorough medical examination at Fort Devens. The medical examiner noted the following defects:

Left scarred drum

Hypertrophic astigmatism

Left ulnar deformity, mild limitation of supination and pronation

Small scar right knee

Scar right knee (bone graft) vertical 20 cm long

The examiner concluded that the plaintiff was "qualified for General Duty."

On August 25, 1954, plaintiff's case was considered by a board of medical officers. The board, after noting plaintiff's defects in technical medical terms, was required to "State Disability In Nontechnical Language." In response thereto, the board stated as follows:

Loss of some tissue left forearm, moderate limitation of rotation, left forearm; pain in scar in right leg.

The board concluded that the plaintiff was "Not Incapacitated" for military duty and "was capable and is capable of performing general military service in a limited capacity."

Plaintiff has been receiving disability compensation from the Veterans' Administration during the period covered by the present claim.

This case comes before the court on plaintiff's and defendant's motions for summary judgment. The defendant in its motion for summary judgment has raised the question of the statute of limitations, 28 U. S. C. § 2501, which provides in pertinent part as follows:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

Plaintiff was released from active duty on July 25, 1946, not by reason of physical disability, without retirement pay. On February 18, 1947, plaintiff was recalled to active duty

for the purpose of physical reevaluation, and on March 27, 1947, plaintiff was found by a retiring board qualified for general service with a waiver. This decision was approved by the Secretary of War on April 27, 1947. On May 14, 1947, he was again released to inactive duty without retirement pay. His right of action accrued only when the retiring board acts arbitrarily or otherwise unlawfully. *Odell* v. *United States,* No. 145-55, decided April 3, 1956. It was on this date (May 14, 1947) that plaintiff's cause of action accrued.

Plaintiff's petition was filed March 14, 1955, more than six years after the approval of the retiring board's action by the Secretary of War. Therefore, the claim is barred by the statute of limitations, *supra.*

The fact that administrative proceedings were being pursued during the intervening period between the date of his release from active duty and the filing of his petition, does not aid the plaintiff. This Court on numerous occasions has held that pursuit of permissive administrative remedies does not toll the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Girault* v. *United States,* No. 50474, decided November 8, 1955; *MacFarlane* v. *United States,* No. 294-55, decided April 3, 1956.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

It is so ordered.

WHITAKER, *Judge,* and LITTLETON, *Judge,* concur.

MADDEN, *Judge,* and JONES, *Chief Judge,* concur in the result.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 140 F. Supp. 415.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956. Petitioner's motion for rehearing, timely filed, was denied July 12, 1956, and his petition for a writ of certiorari was filed on September 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the claim of petitioner, an officer in the Army of the United States released from active duty

in 1947 "not by reason of physical disability," is barred by the six-year statute of limitations in the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

STATEMENT

Petitioner held commissions in the Officers Reserve Corps and the Army of the United States, neither of which is a component of the Regular Army, under emergency legislation (Deft. Ex. A). After honorable war service during the course of which he was wounded, petitioner, in common with many officers holding comparable commissions, was demobilized as of July 25, 1946, and reverted to inactive status (Deft. Ex. B).[1] His release to inactive duty was "not by

[1] Commissions in the Army of the United States were issued for the duration of World War II and six months or for a period stated in the commission itself (H. Res. 199, Sept. 22, 1941, 55 Stat. 728, 729). Such commissions were terminable at any time at the pleasure of the President or by Act of Congress. Congress, in fact, terminated these commissions as of July 1, 1948 (Act of July 25, 1947, 61 Stat. 451). Reserve commissions of the type held by petitioner were granted pursuant to Section 37 of the National Defense Act (Act of June 3, 1916, as amended, 39 Stat. 189; 42 Stat. 1033, 10 U. S. C. (1946 Ed.) 352, 358) and were terminated on April 1, 1953. Proclamation 2974, April 28, 1952, 17 F. R. 3813; Section 1 (c) of Emergency Powers Continuation Act, 66 Stat. 333.

reason of physical disability," *i. e.*, petitioner was not released because he was considered unfit to perform the duties of an officer (Deft. Ex. B).

In February 1947, petitioner was recalled to active duty status and assigned to Murphy General Hospital for the purpose of physical examination and appearance before an Army Retiring Board.[2] After this examination and hearing, the Board found that petitioner was not permanently incapacitated for active service and recommended that, if assigned, petitioner be assigned to full military duty with a waiver for mild deformity and limitation of movement in his left arm (Pl. Ex. 3). This finding was concurred in by the Surgeon General and approved by the Secretary of War on April 24, 1947 (Deft. Ex. A).

At the hearing before the Board, petitioner stated that he desired to be relieved from active duty and did not desire to remain on active duty with a waiver (Pl. Ex. 3). On May 7, 1947, petitioner was ordered released to inactive duty in the Reserve (Deft. Ex. C).

By order dated February 21, 1951, petitioner was recalled for one day's active duty for the purpose of undergoing a physical examination preliminary to planned orders for extended active duty in the Korean theater (Deft. Ex. D). The examination thus con-

[2] Army Retiring Boards, at the time here material, were convened pursuant to R. S. 1246, 10 U. S. C. (1946 Ed.) 961, and were charged with the function of determining whether an officer, appearing before the board, was capable of discharging the duties of his office. R. S. 1248, 1249, 10 U. S. C. (1946 Ed.) 963, 964. Access to these boards for non-regular officers was created by the Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456.

ducted resulted in a finding that he was not qualified for extended active duty (Deft. Ex. E, Item 77).[3] Petitioner was thereafter notified that he had the choice of being separated entirely from the service or of being transferred into the Honorary Reserve (Pl. Ex. 4). He was transferred into the Honorary Reserve (Deft. Ex. F; Pl. Ex. 5).

Asserting an inconsistency between the result reached in 1947 and in 1951 as to his physical qualifications as an officer, petitioner thereafter sought on various occasions to obtain an administrative determination that he had been permanently disqualified to serve as an officer since 1946 and was entitled to disability retired pay. These requests were refused by the Army (Deft. Exs. G, H, and J). After formal procedures were utilized, the Army, in 1954, again accorded petitioner a complete physical examination. Petitioner was again found "* * * qualified for General Duty * * *" (Deft. Ex. K). Reviewing the result of this physical examination, a board of medical officers found petitioner "* * * not incapacitated" for military duty and "* * * capable of performing general military service in a limited capacity" (Deft. Ex. L).

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[3] The special factors entering into the selection of officers for extended active duty in battle are obvious, and the negative result reached as to petitioner's qualifications for this purpose are in no way inconsistent with the findings of the 1947 Retiring Board. The 1947 Board recognized that petitioner's usefulness for extended active duty was questionable but that he was otherwise fully qualified (Pl. Ex. 3, pp. 2, 3). At the 1947 hearing, petitioner himself recognized his limitation for purposes of combat duty. *Id.*, p. 4.

This suit was instituted in the court below on March 14, 1955 (R. 1). On the basis of the events set out above, petitioner requested that court to declare him permanently incapacitated at all times since his release from active duty in 1946 and to award him disability retired pay from that date (R. 4). The Government moved for summary judgment, urging that petitioner's cause of action, if any, accrued more than six years before the filing of the complaint and pointing out that the subject matter of the case was committed to the exclusive control of the Army and therefore beyond the jurisdiction of the court (R. 5; Deft. Motion for Summary Judgment). Petitioner also moved for summary judgment (R. 7). The court held that petitioner's cause of action accrued on May 14, 1947, the date on which he was released to inactive duty without entitlement to disability retired pay (R. 11–14).

ARGUMENT

1. Assuming the power of the Court of Claims to review factual determinations of a highly technical nature committed by statute to the discretion of the armed services (see *infra,* pp. 9–11), we think that court correctly held that petitioner's cause of action accrued when he was released to inactive duty pursuant to the 1947 Retiring Board recommendation, approved by the Secretary of War. This holding is in accord with numerous decisions of the Court of Claims on similar questions. See, *e. g., Field* v. *United States,* C. Cls. 525–53, June 5, 1956; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Girault* v. *United*

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States, 135 F. Supp. 521; *Odell* v. *United States,* 135 F. Supp. 539; *Rosnick* v. *United States,* 132 Cls. 1, rehearing denied, 132 C. Cls. 6. In each of these cases, the court has recognized that a claim for disability retired pay matures at the latest when the officer is notified of his release without entitlement to such pay by the Secretary after recommendation by a retiring board.

Concededly, some inconsistent rules appear to have been announced by the Court of Claims in dealing with this general class of cases. But, narrowly construed, many, if not all, of these decisions can be reconciled with the proper rule announced in this case. For example, petitioner relies upon a statement in the *Rosnick* case, *supra,* to the effect that a new cause of action accrues where the decision of a review board is arbitrary, a statement which, of course, would vary the actual period of limitations available to an officer claimant.[4] The *Rosnick* case actually applied the same rule as that governing here and the statement to which petitioner points is dictum. Again, petitioner points to *Capps* v. *United States,* 137 F. Supp. 721, for the same proposition. In the *Capps* case, the court held

[4] It should be noted that the petition in this case contains a naked allegation that the Army Board for the Correction of Military Records "arbitrarily" denied petitioner's application (R. 2). An examination of the record in the case discloses that there could be no substance to this charge. And the Court of Claims itself has recognized that the creation of a cause of action to review arbitrary action is not a mere matter of pleading. See *Rosnick* v. *United States,* 132 C. Cls. 6; *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948.

that a claimant's right to disability retired pay, established by the substitution by the Secretary of War of a corrected regulation under the statute, could not be defeated by a Disability Review Board on second hearing by a reexamination of the original facts of record. The court held that, "under these peculiar facts," a separate claim accrued to review this second erroneous action of the Disability Review Board.[5]

Apart from certain inconsistent *statements,* the Court of Claims has never *held* that a cause of action does not accrue for disability retired pay when an officer is separated from service. Nor has it ever *held* that the statute of limitations is tolled as to the cause of action which thus accrues by the availability to the claimant of a statutory review within the services.[6]

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[5] Again, under peculiar facts, a new cause of action was held, in *Uhley* v. *United States*, 121 F. Supp. 674, to arise to review rejection of a claim for disability retired pay presented for the first time to the Board for the Correction of Military Records. The result of such a decision is inconsistent in effect with the principle applied in the instant case and many similar cases. The Government has not accepted the *Uhley* decision (which was interlocutory) nor does it agree that the actions of Disability Review Boards or of the Board for the Correction of Military Records are ordinarily reviewable. Cf. the Court of Claims decisions in *Carlin* v. *United States*, 100 F. Supp. 451; *Spencer* v. *United States*, 102 F. Supp. 774, certiorari denied, 344 U. S. 828, and the Government's brief in opposition in *Spencer*, No. 164, Oct. Term 1952, at pp. 5 *ff*.

[6] The Court of Claims has itself recognized the extreme results of any such holding. It should be remembered that, in proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693 (i). Again, application to the Board for the Correction of Military Records may be made within three years after date of dis-

On the contrary, it has consistently held that the availability of administrative remedies does not toll the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Duff* v. *United States,* 135 F. Supp. 527; *Girault* v. *United States,* 135 F. Supp. 521; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Soukaras* v. *United States,* 140 F. Supp. 797.[7]

The short of the matter is this: Here, as in all similar cases, whatever claim petitioner had accrued in 1947 when he was released to inactive duty without entitlement to disability retired pay. His rights, if any, were fixed at that time and nothing in the permissive statutory review system available to him within the Army tolled the running of time on the judicial assertion of his rights.[8] Accordingly, the de-

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covery of the alleged error or injustice or ten years after date of enactment of the statute creating that Board. 5 U. S. C. 191 (a). Recognizing these time factors, the Court of Claims said, in *Odell* v. *United States*, 135 F. Supp. at p. 541: "* * * But we think that Congress did not, by this provision, intend that cases might be brought in this court 21 years after the pertinent facts had occurred."

[7] There is no need to discuss petitioner's reliance on the district court opinion in *Randolph* v. *United States*, 69 F. Supp. 156 (S. D. Tex.), erroneously shown in the petition for certiorari as arising in the District of Columbia. The *Randolph* case, affirmed on appeal, 158 F. 2d 787 (C. A. 5), has no connection with the problem of exhaustion of remedies or the impact of that doctrine in tolling the statute of limitations. The case held that a district court suit for an officer's disability retired pay was an unconsented suit against the United States and was not within the scope of the Tucker Act since it was a suit for a "pension."

[8] It should be observed that the Court of Claims has never dismissed a case of this type for prematurity where it appeared that the officer claimant had not invoked the internal service mechanism for review, another indication of the position of the Court of Claims that such remedies are purely permissive.

cision below is correct and in accord with the settled law, and there is no occasion for review by this Court.

2. There is, we think, additional reason why review should not be granted. The Court of Claims has exercised traditional jurisdiction in certain types of military pay cases, namely, those in which the question presented for decision involved no inquiry by the court into factual and technical questions of basic entitlement committed by statute to the exclusive jurisdiction of the armed services. In the usual case, the court was called upon, on an undisputed set of facts, to determine the meaning of a statute or regulation for the purpose of pay computation. See, *e. g., Tanner* v. *United States,* 129 C. Cls. 792, certiorari denied, 350 U. S. 842; *Commings* v. *United States,* 89 C. Cls. 498.[9] The case of *Lemly* v. *United States,* 109 C. Cls. 760, decided in 1948, marks the first occasion on which the Court of Claims assumed jurisdiction to review and reverse *factual* determinations fixing the basic relationship between a service and its officers, *i. e.,* whether an officer should be retained or separated and, if separated, in what status. Problems of accrual of causes of action, such as that presented here, stem from this assumption of jurisdiction. In our view, there is at least great doubt as to whether the matters which the Court of Claims is now reviewing in this

[9] These cases constitute the so-called continuing claim cases to which petitioner attempts to resort. In a proper continuing claim case, a determination of a question of law in the claimant's favor merely requires that judgment be given for the amount of the monthly payment so determined for the period in suit but not to exceed six years. See, *e. g., Commings* v. *United States, supra.*

area are within its power. The basic relationship between the military services and their officers—retention or separation—is committed by statute to the discretion of the President or the Secretaries. The statutes in this case are illustrative; see R. S. 1245, 10 U. S. C. (1946 Ed.) 931; R. S. 1246–1253, 10 U. S. C. (1946 Ed.) 961–966.[10] Nothing could be more crucial to internal military management than the question, arising in countless cases and in infinitely varied circumstances, of the status of its officers. And it has been repeatedly held that courts are without power to interfere in matters of internal management of military establishments. See, *e. g., Orloff* v. *Willoughby,* 345 U. S. 83, 93; *Denby* v. *Berry,* 263 U. S. 29; *Reaves* v. *Ainsworth,* 219 U. S. 296; *Creary* v. *Weeks,* 259 U. S. 336, 344.

The Court of Claims appears to have recognized this general rule of non-interference by the judiciary in cases involving the question really presented by this case, namely, whether an officer is medically fit or not to serve in the military forces. In *Wales* v. *United States,* 132 C. Cls. 765, the court said (at p. 769):

> The Medical Board found that plaintiff was fit for general military duty at the time of his release by the Secretary to inactive duty. This finding still stands. This court can not under-

[10] These and similar disability retirement statutes have been replaced by Section 402 (a) of the Career Compensation Act of 1949, 63 Stat. 816, 37 U. S. C. 272a. The Career Compensation Act continues the discretionary power of the services to deal with the question of retirement for disability.

take to determine who is fit or unfit to serve in the military forces. *Holliday* v. *United States* [128 C. Cls. 647]. *Beamish* v. *United States,* 130 C. Cls. 767, 128 F. Supp. 158. And, as stated in *Orloff* v. *Willoughby,* 345 U. S. 83:

> * * * judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

We submit that this principle of the *Wales* case completely disposes of this case. Petitioner is asking that a court declare him unfit to serve as an officer, after the Army has called him fit. This a court cannot do.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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